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In the Supreme Court of the United States

October Term, 1970

ROBERT KENNETH DAVIS, PETITIONER

v.

DETROIT MARINE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 835

ROBERT KENNETH DEWEY, PETITIONER

v.

REYNOLDS METALS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. 41a–55a) is reported at 429 F. 2d 324. Its opinion denying rehearing and rehearing *en banc* (Pet. App. 56a–63a) is reported at 429 F. 2d 334. The opinions of the district court (Pet. App. 9a–40a) are reported at 291 F. Supp. 786, 300 F. Supp. 709, and 304 F. Supp. 1116.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1970. A petition for rehearing was denied on August 11, 1970. The petition for certiorari was filed on October 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

409-222—70

QUESTIONS PRESENTED

1. Whether an employee, alleging employment discrimination prohibited by Title VII of the Civil Rights Act of 1964, waives his right to bring an action under that Title in federal district court by first pursuing the grievance-arbitration procedures of a collective bargaining agreement.

2. Whether an employer, subject to Title VII, may lawfully discharge an employee who refuses solely for religious reasons either to work overtime on Sundays or to find a qualified replacement when the employer has made no showing that his refusal to make a reasonable accommodation to the employee's religious beliefs is necessary for the safe and efficient operation of its business.

STATUTE AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> 42 U.S.C. 2000e–2
>
> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

The pertinent EEOC *Guidelines on Discrimination Because of Religion* are set forth in Appendices A and B, *infra*, pp. 11–15.

INTEREST OF THE UNITED STATES

The decision of the court of appeals may have a significant impact upon enforcement of federal rights under Title VII of the Civil Rights Act of 1964, as well as upon federal labor policy.

Title VII relies strongly on private court actions as a means of enforcing statutory rights against discrimination on the basis of religion, race, color, national origin, or sex. *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400. Federal labor policy favors settlement of disputes arising under collective bargaining agreements through the grievance and arbitration procedures provided for in such agreements. The decision of the court of appeals, which requires that an employee must choose between grievance-arbitration and suit under Title VII, inevitably undermines one or both of these policies. The United States believes that the policies are complementary and that an election of rights should not be required.

Congress has also entrusted the Equal Employment Opportunity Commission and the Attorney General with important responsibilities for eliminating discriminatory employment practices. The court of appeals' refusal to recognize the responsibility of employers to abandon employment practices, not required by business necessity, which, although neutral on their face, have a religiously discriminatory effect, could adversely affect efforts of the federal government to cure all types of discrimination forbidden by Title VII.

STATEMENT

Petitioner was employed by the respondent company for fifteen years prior to his discharge in 1966. Beginning in 1960, labor agreements between the United Automobile Workers, of which petitioner was a member, and the company have included a provision giving the company the right to require employees to work overtime unless they have a substantial and justifiable reason for not doing such work. In September 1965, the company issued an interpretation of the agreement which allowed an employee to be relieved of an overtime assignment by arranging for another qualified employee to replace him.[1]

Petitioner, a member of the Faith Reformed Church since 1961, refused, because of his religious beliefs, to work overtime on Sundays or to ask anyone to replace him on that day.[2] As a result, he was laid off on September 4, 1966, and then discharged on September 11, 1966 (Pet. App. 4a–5a). He filed grievances because of his lay off (September 7) and discharge (September 19) (Pet. App. 5a). The grievances were denied at every stage of the procedure—and finally by an arbitrator on June 29, 1967.

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[1] The collective bargaining agreement also provided for the processing of grievances and their arbitration.

[2] Although he refused to work himself, petitioner did find a qualified replacement on five Sundays between January 1966 and August 1966. Beginning on August 28, 1966, however, petitioner refused to find a qualified replacement for Sunday work. It was stipulated that this refusal, like his refusal to work himself, was "because of his religious beliefs," the sincerity of which was not challenged (Pet. App. 4a–6a).

Petitioner also complained to the Michigan Civil Rights Commission on September 16, 1966 (Pet. App. 7a). That commission denied his claim on December 13, 1966. Petitioner filed a charge with the Equal Employment Opportunity Commission on January 4, 1967. EEOC found reasonable cause to believe the Company had violated Title VII. After conciliation efforts had failed, petitioner brought this suit (Pet. App. 7a–8a).

The district court, relying primarily upon this Court's decision in *Sherbert* v. *Verner*, 374 U.S. 398, and the Commission's *Guidelines on Discrimination Because of Religion*, issued on July 10, 1967, 29 C.F.R. 1605.1 (App. A, *infra*, pp. 10–11), held that the company's discharge of Dewey constituted religious discrimination in violation of Title VII (Pet. App. 21a–27a). The district court rejected the contention that petitioner was precluded from suing under Title VII because he had pursued his rights under the grievance-arbitration procedure of the collective bargaining agreement (Pet. App. 11a–16a).

The court of appeals, with one judge dissenting, reversed and ordered the complaint dismissed. It ruled that suit under Title VII cannot be brought after a grievance has been finally arbitrated (Pet. App. 51a–53a). The court also reached the discrimination issue, however, holding that Title VII was not violated because the company discharged petitioner for violation of the provisions of the collective agreement, which applied equally to all employees, and not because of his religious beliefs (Pet. App. 49a).

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that an employee waives his right to bring a court action to enforce rights against discrimination under Title VII of the Civil Rights Act of 1964 by seeking relief through a grievance-arbitration procedure which is completed prior to the filing of suit is in direct conflict with the decisions of two other courts of appeals. *Hutchings v. United States Industries, Inc.*, 428 F. 2d 303 (C.A. 5); *Bowe v. Colgate-Palmolive Co.*, 416 F. 2d 711 (C.A. 7); *Culpepper v. Reynolds Metals Co.*, 421 F. 2d 888 (C.A. 5). These decisions have correctly recognized that determinations under a grievance-arbitration process involve rights and remedies under a collective bargaining agreement which are distinct from those involved in judicial proceedings under Title VII, and that Congress has made the federal courts the final arbiter of an individual's rights under Title VII. See *Fekete v. U.S. Steel Corp.*, 424 F. 2d 331, 336 (C.A. 3).

An employee should not be forced to elect between his rights under a collective bargaining agreement

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[1] The national labor policy favors the use of arbitration for resolution of disputes arising under collective bargaining agreements. See, *e.g., Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574. By converting invocation of the grievance procedure into a waiver of rights under Title VII, however, the election of rights doctrine imposed by the court below is likely to discourage the use of arbitration as a means of private resolution of problems of discrimination—and thus to undermine the effectiveness of anti-discrimination provisions in collective agreements.

and those under Title VII. Review by this Court is needed to resolve the conflict among circuits on this important issue, which affects the full range of rights to equal employment opportunities conferred by Congress in Title VII.

2. On the merits, the court below appears to rest fundamentally on the proposition that Title VII makes only a simple, direct discrimination unlawful. This narrow interpretation conflicts with a growing line of decisions of other courts of appeals holding that employment practices, regardless of whether they were adopted in good faith and are neutral on their face, are unlawful if they have a discriminatory effect and are not required for the safe and efficient operation of the employer's business. *E.g., Local 189, United Papermakers* v. *United States*, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *Local 53 of Int. Ass'n of Heat & Frost & I & A. Workers* v. *Vogler*, 407 F. 2d 1047 (C.A. 5); *Griggs* v. *Duke Power Co.*, 420 F. 2d 1225 (C.A. 4), certiorari granted, 399 U.S. 926; *Jones* v. *Lee Way Motor Freight, Inc.*, 63 CCH Lab. Cas. ¶ 9504 (C.A. 10, No. 464-69, August 17, 1970); *United States* v. *Sheet Metal Workers Int. Assn. Local U. 36*, 416 F. 2d 123 (C.A. 8). This Court employed similar reasoning in *Sherbert* v. *Verner*, 374 U.S. 398, in holding that a State must show "some compelling * * * interest," 374 U.S. at 398, to justify denial of unemployment compensation under an ostensibly neutral statute to an individual whose religious beliefs forbade her from working on Saturdays. The holding

of the court below also conflicts with the EEOC *Guidelines* which have consistently required an employer to make reasonable accommodations to the religious needs of employees and prospective employees, and which place the burden on the employer to justify refusal to accommodate to a particular practice in terms of business necessity.[4]

There was no showing by the company in this case that its refusal to accommodate to petitioner's religious beliefs was necessary to the safe and efficient conduct of the business. In fact, the existence of the substitute policy suggests that the only effect on the conduct of the business which would be caused by accommodating petitioner's religious belief would be shifting to the company the administrative burden of obtaining (from among the company's own qualified employees) a Sunday replacement for him. Accordingly, and particularly in light of the need for review on the election of rights issue, review by this Court on the question of religious discrimination raised by this petition is warranted.

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[4] The court of appeals held that the district court should have applied the EEOC *Guidelines* (App. B, *infra*, pp. 12–14) which were in effect in 1966, rather than those which became effective in 1967 after the petitioner's layoff and discharge. It held, however, that the employer had complied with both *Guidelines*. As Judge Combs pointed out in dissent, both require the employer to make reasonable accommodations to religious needs of employees "where such accommodations can be made without undue hardship on the conduct of the employer's business." Pet. App. 54a; see App. A, *infra*, pp. 11–12; App. B, *infra*, pp. 13–15.

The concept of "reasonable accommodation" also appears in the Commission's *Guidelines on Discrimination Because of Sex*, 29 C.F.R. 1604.1.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

EEOC Guidelines on Discrimination Because of Religion (1967)

29 C.F.R. 1605.1 Observation of the Sabbath and other religious holidays.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employes who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required

accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people. (Sec. 713(b), 78 Stat. 265; 42 U.S.C. 2000e–12 [32 F.R. 10298, July 13, 1967].

APPENDIX B

EEOC Guidelines on Discrimination Because of Religion (1966)

29 C.F.R. 1605.1 Observance of Sabbath and religious holidays.

(a)(1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular workweek. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.

(2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate to the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.

(3) However, the Commission believes that an employer is free under Title VII to establish a normal workweek (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday. Likewise, an employer who closes his business on Christmas

or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur.

(b) While the question of what accommodation by the employer may reasonably be required must be decided on the peculiar facts of each case, the following guidelines may prove helpful:

(1) An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another.

(2) An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his employees and applicants for employment in connection with special religious holiday observances.

(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alteration in such requirements to accommodate his religious needs.

(4) Where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as

to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees.

(Sec. 713(b), 78 Stat. 265; 42 U.S.C. 2000e–12) [31 F.R. 8370, June 15, 1966].

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